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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 218

MEMPHIS NATURAL GAS COMPANY, Petitioner,
VS.

GEORGE F. McCANLESS, Commissioner of Finance and
Taxation, State of Tennessee, Respondent.

EXCISE TAX CASE

No. 219

MEMPHIS NATURAL GAS COMPANY, Petitioner,
VS.

GEORGE F. McCANLESS, Commissioner of Finance and
Taxation, State of Tennessee, Respondent.

FRANCHISE TAX CASE

BRIEF OF PETITIONER IN SUPPORT OF ITS PETI-
TIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
TENNESSEE

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*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

For the convenience of the court and to avoid unneces-
sary repetition, the petitioner, Memphis Natural Gas

Company, is filing but one brief in support of its two petitions for writs of certiorari to the Supreme Court of Tennessee. Two different suits are involved. One involves Tennessee excise taxes, while the other involves Tennessee franchise taxes. The law and arguments supporting the certiorari petition in the excise tax case are in great measure also applicable to the franchise tax case and therefore only one brief is filed.

POINTS AND AUTHORITIES RELIED ON

I.

A foreign corporation maintaining general offices in Memphis, Tennessee and engaged solely in interstate commerce cannot be held liable for excise and franchise taxes.

Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203;

Anglo-Chilean Corp. v. Ala., 288 U. S. 218;

Atlantic Lumber Co., v. Commissioner, 298 U. S. 553;

Crutcher v. Kentucky, 141 U. S. 47;

Federal Coal Co. v. U. S. Fuel Corp., 147 Tenn. 212;

Matson Navigation Co. v. State Board, 297 U. S. 441;

Murdock v. Pennsylvania, _____ U. S. _____;

Nelson v. Sears, Roebuck & Co., 312 U. S. 369;

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;

Southern Pac. R. R. v. Gallagher, 306 U. S. 167.

II.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and delivers it wholesale to distributing companies.

East Ohio Gas Co v. Tax Commission, 283 U. S. 465;

Federal Power Commission v. Natural Gas Pipe Line Co., 315 U. S. 575;

Illinois Gas Co. v. Public Service Co., 314 U. S. 498;
 Memphis Natural Gas Co. v. McCanless, _____
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 Tax Case);
 Missouri v. Kansas Gas Co., 265 U. S. 298;
 Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;
 Public Utilities Commission v. Landon, 249 U. S.
 239;
 State Tax Commission v. Gas Co., 284 U. S. 41.

EXCISE TAX CASE

The principal question involved is whether or not the Memphis Natural Gas Company, a Delaware corporation, maintaining general offices in Memphis, Tennessee and engaged solely in interstate commerce, can be held liable for Tennessee excise taxes.

Admittedly this excise tax statute quoted in the certiorari petition is a privilege tax.

Manufacturing Corporation v. Graham, 161 Tenn. 46;

Memphis Dock & Forwarding Co. v. Fort, 170 Tenn. 109.

We are not here concerned with principles relating to permissible income taxes under the Commerce Clause of the Federal Constitution because the Tennessee Constitution expressly prohibits income taxes except "upon incomes derived from stocks and bonds that are not taxed ad valorem."

Tennessee Constitution, Article II, Section 8;
 Evans v. McCabe, 164 Tenn. 672.

The fact that the excise tax is measured by net income attributable to activities in Tennessee does not change the basic fact that this is a privilege tax.

As stated in *McLeod, Commissioner v. J. E. Dilworth Co.*, U. S., May 15, 1944:

"Thus we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution.' "

Likewise it is improper to render valid a privilege tax statute by viewing it as an income tax statute simply because the measure of the privilege tax is determined by net income attributable to the taxing State.

All of petitioner's business in Tennessee for the years here involved is solely interstate commerce. It is true that petitioner is a Delaware corporation with its general offices in Memphis, Tennessee, but this does not make it liable for excise taxes so long as petitioner refrains from intrastate business.

This question has been before this court many times. There are cases directly in point supporting petitioner's position.

It will serve no good purpose to deal with these authorities at length, and we therefore briefly comment upon them.

Some of the cases directly in point are:

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555:

The pipe line company was a Maryland corporation qualified for business in Missouri. It operated a pipe line from Oklahoma through Missouri and into Illinois. It maintained in Missouri two general offices and there did

all acts similar to those done by petitioner in its Memphis office.

Missouri imposed a franchise tax upon all corporations. This court emphatically held that since the pipe line company was engaged in Missouri in nothing but interstate commerce, it could not be held liable for the franchise tax even though it had two general offices, or in present day language, a commercial domicile, in Missouri.

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property, itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected. *Heyman v. Hays*, supra, page 186 (35 S. Ct. 403)."

It is quite impossible for a litigant to find a case more squarely in point than the above decision. It has recently been cited with approval by this court.

***Southern Pacific R. R. v. Gallagher*, 306 U. S. 167:**

On Page 179 the court said when speaking of Ozark Pipe Line Corporation v. Monier:

"The tax was forbidden because on the privilege of doing an exclusively interstate business."

On Page 180 the court said:

"The language just quoted shows that this court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference therewith because a tax directly upon it. * * * nothing was done in Missouri except in furtherance of transportation'. It was this conclusion of the court on the factual situation which brought about the Ozark decision. **Where there is also intrastate activity, an apportioned State franchise tax on foreign corporations doing an interstate business is upheld.** Southern Natural Gas Corp. v. Ala., 301 U. S. 148, 155. **A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid.** Atlantic Lumber Co. v. Commissioner, 298 U. S. 553, 556."

Professor Thomas Reed Powell, Professor of Constitutional Law in the Harvard Law School, stated in the Harvard Law Review, Vol. 53, page 909, April, 1940:

"Excises on doing business in corporate form, measured in ways permissible if **both** local and interstate commerce are conducted, have been uniformly condemned when the business is exclusively interstate."

Crutcher v. Kentucky, 141 U. S. 47, 57:

"To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *."

Murdock v. Pennsylvania, U. S. , May 3, 1943:

This court said:

"A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

Thus it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U. S. 33, 56-58), **although it may tax the property used in, or the income derived from,** that commerce, so long as those taxes are not discriminatory."

Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203:

Massachusetts levied an excise tax in almost the exact language of the Tennessee statute.

The taxpayer was incorporated in New Jersey, but it maintained an office in Boston "in charge of a District Sales Manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipment of goods for the New England States are conducted." It was admitted that the taxpayer was engaged exclusively in interstate commerce.

The court said:

"The right to lay taxes on taxable property or **on income** is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of those factors—the proportion of the value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?

"Cheney Bros. Co. v. Mass. 246 U. S. 147, 153, 154, **necessitates a negative reply.** Under St. 1909, c. 490, Part III, Par. 56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the

present cause. This court said: 'We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause'. Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid **without regard to measure or amount**. *Looney v. Crane*, 245 U. S. 178, 190; *International Paper Co., v. Mass.*, 246 U. S. 135, 142; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 249; *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150."

Matson Navigation Co. v. State Board, 297 U. S. 441:

This case involved franchise taxes and this court said:

"A foreign corporation whose sole business in California is foreign and interstate commerce cannot be subjected to the tax in question. *Alpha Cement Co. v. Massachusetts*, 268 U. S. 203; *Anglo-Chilean Nitrate Co. v. Alabama*, 288 U. S. 218."

Nelson v. Sears, Roebuck & Co., 312 U. S. 369:

"Thus Iowa may not lawfully license or regulate the business of agents soliciting orders to be shipped in interstate commerce; or limit or condition the right to enforce mail order contracts in Iowa courts. The power to exclude foreign corporations altogether from doing a local business does not enable the State to impose burdens upon the transaction of interstate commerce by a foreign corporation **registered** in the state; and **registration** by a foreign corporation in order to do business within the State does not constitute a waiver of the corporation's right to transact interstate business free from the burdens of state regulation or taxation."

The Supreme Court of Tennessee has announced the above principles of law and followed them until its decision herein, which is accounted for by the dictum in *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649.

Federal Coal Co. v. U. S. Fuel Corporation, 147 Tenn. 212:

"Although plaintiff in error had its principal office in Tennessee, with all its organization, and was here doing business, still, if all this business had been interstate in character, the plaintiff in error would not have been liable to any privilege tax. *Heyman v. Hay*, 236 U. S. 178."

Atlantic Lumber Co. v. Commissioner, 298 U. S. 553:

Massachusetts imposed an excise tax similar to the Tennessee excise tax for the privilege of carrying on business within the State. The taxpayer was organized under the laws of Delaware and maintained its principal office in Boston. This court found that the taxpayer was engaged in some intrastate business and therefore held it liable for the tax, but this court stated:

"If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution (citing several cases), but such is not the case."

Anglo-Chilean Corporation v. Alabama, 288 U. S. 218:

This was a New York corporation with its principal office in that State, but it qualified to do business in Alabama by filing the usual papers and there maintained important offices.

Alabama imposed a franchise tax. The taxpayer was engaged solely in interstate commerce in Alabama.

This court said:

"The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax."

The court further said when speaking of the Ozark Pipe Line case, *supra*:

"We held that the tax could not be constitutionally exacted, and that the fact that the foreign corporation was organized for local business and had applied for and received a local license conferring the power of eminent domain did not enable the state to tax its right to carry on interstate commerce."

The foregoing cases appear to conclusively sustain the proposition that petitioner cannot be held liable for the Tennessee excise taxes as it is engaged in Tennessee solely in interstate commerce, and this result is not changed by the fact that it has general offices in Tennessee.

It appears that the Supreme Court of Tennessee has decided this ~~franchise~~^{excise} tax question in a manner inconsistent with the applicable decisions of this court.

There is one remaining point for discussion.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from

the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line;

Also R. 44, 56.

The above described arrangement does not constitute intrastate business. This court has recently decided that it is interstate business.

Illinois Gas Co. v. Public Service Co., 314 U. S. 498:

The Illinois Commerce Commission ordered the Illinois Natural Gas Company to construct certain additional pipe lines and otherwise undertook to exercise jurisdiction over the pipe line, which was resisted. Mr. Chief Justice Stone stated that the transmission line was beyond the jurisdiction of the State Commission.

When stating the facts, he pointed out that the pipe line company sold and delivered large quantities of gas to distributing companies.

"It also sells and delivers gas to several industrial consumers in the State."

"After the reduction of pressure the gas continues to move in appellant's lines until it passes into the service pipes of the local distributors, or industrial users, where the pressure is again substantially reduced."

This court laid down the positive rule that sales to an industrial consumer are interstate where the industrial consumer constructs its own line to connect with the transmission line and takes the gas at the point of connection. This completely destroys the fallacious argument made by the respondent to the effect that the sales by the petitioner to the Memphis Generating Company are intrastate sales.

The Supreme Court of Tennessee decided the question against respondent in the companion gross receipts tax case.

Memphis Natural Gas Co. v. McCanless, Tenn., 177 S. W. (2) 841, decided February 5, 1944:

The court said:

"It should be mentioned that in addition to its sales to the City of Memphis and to West Tennessee Light and Power Company the complainant also has a contract by which it sells gas to Memphis Generating Company, that concern using it for fuel. However, the complainant does not undertake to deliver that gas at the plant of the Memphis Generating Company but by an arrangement between the Generating Company and the City of Memphis the City's pipes take the gas from complainant's pipes over to the place of business of the Generating Company. Instead of building its own service pipe to connect with complainant's line the Generating Company procures the City of Memphis to render this service through its service pipes. The complainant has nothing to do with this delivery and herein the case differs from *Southern Natural Gas Corp. v. Alabama*, 301 U. S. 148, 57 S. Ct. 696, 81 L. Ed. 970, relied on by the commissioner."

Other cases reaching the same conclusion are:

Federal Power Commission v. Natural Gas Pipe Line Co., 315 U. S. 575;
State Tax Commission v. Gas Co., 284 U. S. 41;
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;
Ozark Pipe Line Corp. v. Monier, 266 U. S. 555;
Missouri v. Kansas Gas Co., 265 U. S. 298;
Public Utilities Commission v. Landon, 249 U. S. 239.

FRANCHISE TAX CASE

The franchise tax involved is for the privilege of engaging in business in corporate form in Tennessee.

The arguments and authorities made *supra* in connection with the excise tax are applicable to the question of franchise tax liability.

We do not want to unduly burden the court by repetition thereof. Our question is whether or not this foreign corporation with general offices in Tennessee and doing solely interstate business in Tennessee can be held liable for this privilege tax.

The three companion suits involving gross receipts taxes, excise taxes and franchise taxes were tried on a common record and the Supreme Court of Tennessee handed down its written opinions in all three cases on February 5, 1944. To understand the conclusions and views of the Supreme Court of Tennessee about any one of the three suits it is necessary to read the opinions in the three suits though the gross receipts tax case is not here involved as those taxes were ordered refunded to petitioner.

The Supreme Court of Tennessee predicated petitioner's liability for excise and franchise taxes upon the dictum appearing in *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649 as pointed out in the certiorari petitions. For the reasons discussed therein petitioner respectfully submits that this was error and the conclusions of the Supreme Court of Tennessee in direct conflict with applicable decisions of this court.

Respectfully submitted,

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